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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

GEORGE DUTTON, *et al.*, *Petitioners*

v.

CITIES SERVICE DEFENSE CORPORATION *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TALLEY & OWEN
COOPER JACOWAY
Counsel for Petitioners

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cases on January 11, 1957, in which a re-hearing was denied on February 20, 1957. By timely orders, the time for filing this Petition for Writ of Certiorari was extended to and through July 5, 1957.

CITATION TO OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit in the above cases is reported in 240 F (2) 113.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on January 14, 1957. A timely Petition for Rehearing was filed, and was denied on February 20, 1957. The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254 (1).

QUESTIONS PRESENTED

1. In the application of the Fair Labor Standards Act, does Section 2 of the Portal to Portal Act of 1947 automatically prohibit recovery by an employee for that uncompensated time regularly spent by him under the employer's instructions in the discharge of his usual and normal work, but spent outside the regularly scheduled hours of employment?

2. In the application of the Fair Labor Standards Act, does Section 2 of the Portal to Portal Act of 1947 automatically prohibit an employee from recovering for that uncompensated time at the close of each working day regularly spent by him in a labor pool that was demanded and required by the employer and was maintained exclusively for the employer's benefit; and, while in said labor pool, the employee was at all times subject to call at the will of the employer for compulsory return for another shift to his primary duties?

3. In the application of the Fair Labor Standards Act, does Section 2 of the Portal to Portal Act of 1947 automatically prohibit recovery by an employee for that uncompensated time regularly spent by him in the discharge of activities for which the employer had the custom and practice of paying and which were necessary in the discharge of those usual and normal tasks that constituted the primary duties he was employed to perform,

but which activities were discharged outside the scheduled hours of employment.

4. In the application of the Fair Labor Standards Act, does Section 2 of the Portal to Portal Act of 1947 automatically prohibit an employee from recovering for that uncompensated time spent daily by him in the discharge of activities compulsorily required of him by the employer, which were necessary and indispensable to the discharge of his primary duties and which were so closely related to his primary duties as to constitute an integral part of them?

STATUTES INVOLVED

The statutory provisions involved are Sections 7 and 16 of the Fair Labor Standards Act of 1938, and Section 2 of the Portal to Portal Act of 1947.

STATEMENT

The approximately 500 Petitioners are former employees of an explosives and chemical plant operated in Arkansas by Respondent during World War II.

They brought suits in the Federal District Court for overtime wages due them under a law relating to commerce, the Fair Labor Standards Act. A typical suit is one brought by George Dutton and others (R.1). After passage of the Portal to Portal Act of 1947, Defendant pleaded the provisions of that Act (R.9,11). The employees then amended their Complaint (R.14-32). The various suits were finally consolidated in the District Court as *Dutton, et al* v. *Cities Service Defense Corporation* (R.12), and were heard by a Master under a Stipulation of the parties that the Master's findings of fact should be final (R.94). The District Judge substantially adopted the Master's report (R.328-335), and judgment was entered (R.335).

An appeal was taken by the employer to the Court of Appeals for the Eighth Circuit (R.362) and those employees who had been denied recovery took a cross-appeal (R.364). The Court of Appeals ruled that Section 2 of the Portal to Portal Act prohibited recovery for any of the employees and directed dismissal of all the employees' claims.

The employees are now praying that this Court grant a Writ of Certiorari to the Court of Appeals for the Eighth Circuit to review and correct what Petitioners firmly believe to be the errors committed by that Court.

The instant case is somewhat complicated, because it involves several separate factual situations, each situation presenting a different problem. We shall try to summarize those general situations.

One group of employees regularly spent, and at the direction of the employer, substantial amounts of uncompensated time in the discharge of their regular and normal work. That time was spent outside the scheduled work hours and the men were not paid for it. Typical of this situation is that of Carl James, a filling station operator, who regularly reported early, under company instruction, for work; and who worked straight through a so called lunch period, without any free time, and who was not paid for any of such extra or overtime work or work during the lunch hour (R.153). The same situation is true in principle for various other Petitioners now seeking the aid of this Court R.14 par. C5; R.149J; R.151 Change House Operators; R.152 Warehousemen; R.153 J. A. Hamilton; R.153 Chemists and Testers; R.157 par. 7.

Another group of men worked in eight hour shifts on a twenty-four hour continuous operation. The Company actually paid the men for eight and a half hours, as follows:

Eight hours of productive work and fifteen minutes for Company required activities before the shift period and fifteen minutes for Company required activities after the shift period.

The employer, in the actual operation of the Plant, required these men to report at their places of productive work—their work benches—and begin their productive work twenty minutes in advance of the scheduled shift period R.117 par. 7 & 8; R.135 par. A3; R.138 par. 3. They were then relieved eight hours later, but the employer prohibited the men from clocking out and from leaving the premises until thirty-five minutes after they left their work benches. When they left their work benches and had completed the routine of activities required of them by the employer (and for which the employer paid them for fifteen minutes), these men were held by the employer in a labor pool in a standby or on call basis maintained for the benefit of the employer R.135 P.A4; R.139 P.B4. Among other purposes, the Company maintained the labor pool so as to be assured of being able to call from the labor pool any needed employee (in the event that there was a shortage of employees on the new shift) so that the employer was assured of uninterrupted continuation of the work. During the time that they were in the labor pool, the men were subject to compulsory recall to work the new shift whenever the employer desired it. They were not paid for the time they were held in the labor pool although they were paid if they actually worked a second shift. The District Court gave recovery to these men. The Court of Appeals dismissed their claims.

Because of the health hazards incident to work in a chemical plant, another group of Petitioners were required by the employer to change daily into company furnished clothes in the morning. The Company expected to pay for the time so spent and established the custom and

practice of paying for it. During the actual operations of the Plant, the employees, with the employer's permission, regularly changed from street clothes into their work clothes before the regularly scheduled work period so that they were actually at their places of productive work and working there ten minutes or more earlier than the employer had scheduled; and the employer received the benefit in a longer working period of the time so spent R.142. These Petitioners ask that they be paid for the time at the beginning of the day spent in activities which the employer itself had made compensable by custom and practice and from which the employer received the benefit of a longer working period R.146. Maintenance men in the Service Area, etc. R.148 Machinists; R.149 Amos Ashcraft. The District Court denied recovery and the Court of Appeals affirmed the District Court.

A group of men clocked in adjacent to a place known as Gate 9. Gate 9 was at all times guarded by the employer. Because of the problem connected with producing explosives in this chemical plant, Gate 9 was a substantial distance from the units where the explosives were actually produced. Gate 9 and the area to which it opened, was at all times under guard as a security area. The men could pass through Gate 9 only when permitted by the guards and the company required them to travel from Gate 9 to their change houses and back in Company furnished transportation and prohibited their travel in any other fashion. The Company required of these men a complete routine of activity that consumed eight hours and forty-seven minutes a day, including the time spent at productive work. The Company paid for only eight hours and thirty minutes, leaving these men uncompensated for seventeen minutes daily. The activities that consumed the seventeen minutes involved physical and mental exertion, pursued under the direction and control of the

Defendant, entirely on the Defendant's premises and also for the Company's purposes and benefit and also necessary to accomplish the production in which the employer was engaged R.137-38.

The same principle applies to other employees R.142 P.68.

These employees believe it fair to say that the activities in question were so closely related to their primary activities as to be an integral part of them. The District Court gave recovery for this time and the Circuit Court of Appeals denied it.

The Petitioners have attempted to describe four particular fact situations presented by this case. In some instances, however, the situations are not completely independent of each other. There are situations when a particular employee, or group of employees, may be involved in more than one of the above situations.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that it will be easier to consider the reasons for granting the Writ if there is separate consideration of the propositions presented by the questions.

I

In the application of the Fair Labor Standards Act, Section 2 of the Portal-to-Portal Act of 1947 does not automatically prohibit recovery by an employee for that uncompensated time regularly spent by him under the employer's instructions in the discharge of his usual and normal work, but spent outside the regularly scheduled hours of employment.

1. The claims now under consideration were for time consumed by the employees in the discharge of activities

that comprised the regular, normal duties of their employment. They constitute true overtime work.

The Court of Appeals for the Eighth Circuit has interpreted Section 2 of the Portal-to-Portal Act in such a fashion as to deny compensation to these employees for time spent by them at their primary duties. This decision is in direct conflict with the decisions of the Fourth Circuit, *United States Steel Co.* v. *Burkett* (1951), 192 F(2d) 489; the Sixth Circuit, *E. W. Stack & Sons, Inc.* v. *Thompson* (1952), 194 F (2d) 423; the Seventh Circuit, *Frank* v. *Wilson & Co.*, (1949), 172 F (2d) 712; and, the Ninth Circuit, *Biggs* v. *Joshua Hendy Corp.* (1950), 183 F (2d) 515.

The Portal-to-Portal Act of 1947 did not automatically cut off all the existing unpaid wage claims then due employees under the Fair Labor Standards Act. The proper construction of the Portal-to-Portal Act was summarized:

> "Cross-appellants further contend that work performed by appellants during lunch periods cannot be the basis for recovery under the Fair Labor Standards Act by reason of Section 2 of the Portal-to-Portal Act, 29 U.S.C.A. Section 252, because such work is not made compensable by the express provision of a contract within the meaning of Section 2(a) (1). That section is directed against claims for compensation for activities, such as dressing for work, traveling within the plant to the job location, etc., which are different from the activities which comprise the regular, normal part of the employment. The section has no application where, as here, the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek." *Biggs* v. *Joshua Hendy Corp.*, 183 F (2d) 520.

Instead, the Portal-to-Portal Act preserved for working people their legitimate claims.

"Sponsors of the legislation in both Houses of Congress asserted that it 'in no way repeals the minimum wage requirements and the overtime compensation requirements of the Fair Labor Standards Act,' that it 'protects the legitimate claims' under that act, and that one of the objectives of the sponsors was to 'preserve to the worker the rights he has gained under the Fair Labor Standards Act.' It would therefore appear that the Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor Standards Act are to be given a liberal interpretation and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come 'plainly and unmistakably within (the) terms and spirit' of such an exemption."

Interpretative Bulletin

General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938 Section 790.2—Interrelationship of the Two Acts. (Appendix A, infra p. 25.)

Under the Portal-to-Portal Act an employer was liable to an employee for time spent by the Employee in any activity (task) that the employer itself had recognized to be compensable. That recognition of liability could come in either of two ways, either bilaterally through contract, or by unilateral action when the employer made the activity compensable by his own custom or practice. 29 U.S.C.A. Section 252(a) (Appendiv A, infra p.21.)

The test of liability is the employer's custom or practice to pay for the activity. The Act does not require that the employer have the bookkeeping practice of paying for it during that period of the day for which recovery is sought. Instead, once an employer has itself recognized a task (activity) as compensable, Section 2(c) of the Portal-to-Portal Act expressly requires the employer to pay

for all the time spent by the employee in that activity. 29 U.S.C.A. Section 252(c). (Appendix A, infra p. 21.)

The Eighth Circuit in passing on this case failed to distinguish between a custom to pay for a particular activity or task and a custom of paying for that task during a particular portion of the day. By virtue of that error, the Court then held that an employer is not required to pay an employee for the time consumed by the employee in a task, although the employer requires or knowingly permits the employee to work at his usual and normal work for substantial periods of time outside the scheduled work period.

Petitioners respectfully submit that this situation is well summarized in the case of *United States Steel Co. v. Burkett*, 192 F (2d) 489, 491:

> "As was said by Judge Rifkind . . . 'Neither contract nor custom can open an avenue of escape from the obligations imposed by the Fair Labor Standards Act, 29 U.S.C.A., Section 201 et seq. A contract may not validly dictate that eight hours work shall be calculated as seven hours.'"

The Eighth Circuit, in the instant case, has now refused to apply the standard of liability that the Congress of the United States created, and which the other Circuits mentioned above have applied.

2. The result reached by the Eighth Circuit Court is not only in conflict with the decisions of other Circuits, and is not only in conflict with the express provisions of the Portal-to-Portal Act, but it also presents a problem of great importance in the future administration of the Fair Labor Standards Act and the Portal-to-Portal Act.

This case arises under Section 2 of the Portal-to-Portal Act and cases hereafter will be governed by the provisions of Section 4 of that Act.

A comparison of Section 2 and Section 4 establishes that, while there are minor differences in language, the two sections are substantially identical in meaning and purpose so far as the question of liability for activities is concerned.

Sec. 2	Sec. 4
"No employer shall be subject to any liability . . . for or on account of any activity . . . except an activity which was compensable by either:	"No employer shall be subject to any liability . . . for or on account of any of the following activities:
(1) an express provision of a written or nonwritten contract . . . ; or, (2) a custom or practice . . . covering such activity."	(1) . . . . (2) activities which are preliminary or postliminary to said principal activity or activities 4(b) . . . the employer shall not be relieved (of liability) if such activity is compensable by either: (1) an express provision of a written or nonwritten contract . . . or; (2) custom or practice in effect . . . involving such activity. . . ."

(Appendix A, infra pp. 22, 23.)

Petitioners submit that the two sections are obviously substantially identical in meaning and in language.

Consequently, a ruling against employees for their overtime work in the instant case must necessarily call for a similar ruling in cases arising under Section 4.

Completely apart from the effect on the many petitioners, the ruling of the Eighth Circuit Court is necessarily of great importance to all the employees in America that are subject to the Fair Labor Standards Act and whose lives and fortunes are shaped by the Fair Labor Standards Act. Settlement of this question is plainly in the public interest.

II

In the application of the Fair Labor Standards Act, Section 2 of the Portal-to-Portal Act of 1947 does not automatically prohibit an employee from recovering for that uncompensated time at the close of each working day regularly spent by him in a labor pool that was demanded and required by the employer and was maintained exclusively for the employer's benefit; and, while in said labor pool, the employee was at all times subject to call at the will of the employer for compulsory return for another shift to his primary duties.

1. The Circuit Court denied recovery for that time demanded by the employer and spent by employees in a labor pool maintained exclusively for the employer's benefit.

At the close of each day the men were held, by mandatory Company requirements, out in the open without shelter R.230. They waited there while the Company determined whether it desired any of them to report back to work. This procedure assured the Company of financial benefits from the United States Government and assured the Company of a constant supply of trained workers to be recalled at the will of the Company for further work R.135. The Ninth Circuit Court of Appeals has held such waiting time to be working time. *Biggs* v. *Joshua Hendy Corp.* (1950), 183 F (2d) 515, 520. The Eighth Cir-

cuit Court of Appeals, in this case, has held that it is not working time. This is a square conflict between the two circuits and it is of great importance to the hundreds of thousands of American workers covered by the Fair Labor Standards Act who are subject to the provisions of the Portal-to-Portal Act.

It is inconceivable that an employer can take for his own purposes the only asset these men have to sell—their time—and not be required to pay them for it.

2. Petitioners respectfully submit further that the decision of the Eighth Circuit in this case is squarely in conflict with the decisions of this Court as announced in *Armour & Company* v. *Wantock*, 323 U. S. 126, 89 L. ed 118; and *Skidmore* v. *Swift & Company*, 323 U. S. 134, 89 L. ed 124.

3. The decision reached by the Eighth Circuit must of necessity apply to the hundreds of thousands of persons subject to the Fair Labor Standards Act and Section 4 of the Portal-to-Portal Act.

The Fair Labor Standards Act recognizes and requires that a man should be paid for the time he works—the time that he spends under the employer's direction and for the accomplishment of the employer's purposes and under the direct control of the employer. The Eighth Circuit has declined to follow the Congressional directive as interpreted by this Court and as that directive was interpreted by the Ninth Circuit.

III

In the application of the Fair Labor Standards Act, Section 2 of the Portal-to-Portal Act of 1947 does not automatically prohibit recovery by an employee for that uncompensated time regularly spent by him in the discharge of activities for which the employer had the cus-

tom and practice of paying and which were necessary in the discharge of those usual and normal tasks that constituted the primary duties he was employed to perform, but which activities were discharged outside the scheduled hours of employment.

I. The Eighth Circuit, in passing on this question, has reached a result that is completely foreign to the express requirements of the Fair Labor Standards Act and of the Portal-to-Portal Act. Section 2 of that Act permits an employer to decide what activities performed by an employee are compensable. He can reach that decision either through contract or custom and practice. Once, however, he reaches that decision and by his own action makes an action compensable, the Portal-to-Portal Act requires him to pay for all that time spent by the employee in that activity. In the instant situation presented by this question, the Eighth Circuit has ignored that Congressional provision and has reached a result that is absolutely opposed to the Congressional Mandate.

In the instant situation the Company required the men to go through certain activities which the Company itself recognized to be compensable and made compensable. It originally expected those activities to be performed between certain hours of the day R.148 par. H5. In the actual operation of the employer's plant, however, the Company permitted the men to commence those activities somewhat in advance of the scheduled period. As a consequence, the men were ready for work or at their work benches and embarked on their work much earlier than they would have been if they had performed the activities between the scheduled hours. As a consequence of the employer's permitting the men to perform the required activities early, the Company secured from the men a longer period daily spent in the principal duties that the men were expected to perform.

The employer itself had made the clothes changing in the moring not only compulsory but compensable. It was a part of the routine of activity required by the employer and by the necessities of the employment.

Once the Company had made that activity compensable, Section 2(c) of the Portal-to-Portal Act (Appendix A, infra p. 22) requires the employer to pay for all the time spent in the activities and that the employer pay these men for their time so spent. Petitioners respectfully submit that the Eighth Circuit Court erred in reaching a result that is contrary to the terms of the Portal-to-Portal Act.

The result reached by the Eighth Circuit deprives the men of the only thing they had for sale—their time—and enriches the employer by a longer and greater productive working period daily; and all this without any compensation to the employee.

The Portal-to-Portal Act expressly requires the allowance of these claims. The employees did not make the claims compensable. For its own business reasons, and in answer to the specialized production problems inherent in the Plant's operations, it was the employer that made the activities compensable.

Once the employer created its own liability, the Portal-to-Portal Act requires that the employer now pay for the time spent in their performance by the employees.

For the reasons heretofore advanced in connection with the earlier questions, the resolution of this question by this Court is clearly in the public interest.

IV

In the application of the Fair Labor Standards Act, Section 2 of the Portal-to-Portal Act of 1947 does not

automatically prohibit an employee from recovering for that uncompensated time spent daily by him in the discharge of activites compulsorily required of him by the employer, which were necessary and indispensable to the discharge of his primary duties and which were so closely related to his primary duties as to constitute an integral part of them.

1. The result reached by the Eighth Circuit Court in the instant case is directly and admittedly opposed to the decision of this Court in the case of *Steiner* v. *Mitchell*, 350 U. S. 247, 100 L. ed 267. Judge Van Oosterhout said:

> "If all present cases were governed by Section 4 the Steiner case would compel us to hold that the clothes changing and bathing were part of the employees principal activties and compensable as such." (Appendix B, *infra* p. 33.)

The Court of Appeals has misconstrued the relationship of Section 2 and Section 4 of the Portal-to-Portal Act, and has misapplied Section 2. Section 2 and Section 4 have previously been compared (this brief, *supra*, p. 11).

The two sections are obviously substantially identical in meaning and language and identical problems arising under them demand identical treatment.

Neither the provisions of the Act nor the reasons for the Act justify a different treatment under the two sections for the same activities. Section 2 relates to activities performed prior to May 14, 1947, and Section 4 applies to activities on or after May 14, 1947. It seems inconceivable that the Congress would have intended that the same activities pursued by the same employee would be compensable after May 14, 1947, but not compensable before May 14, 1947.

All of the activities in this case were found, as a fact, to be necessary to accomplish the production in which the employer was engaged. They involved physical and mental exersion pursued under the direction and control of the employer; they were entirely on the employer's premises; they were for the employer's purposes and benefit R.140. The Master and the Court also found that the activities constituted work under the decision in *Skidmore* v. *Swift & Co., supra*. This was a finding of fact under an agreement that the finding would be final R.95.

This case is substantially different from the consolidated cases of *Ciemnoczolowski* v. *Q. C. Ordnance Corp. (Dunning* v. *Q. C. Ordnance Corp.)* 228 F (2d) 929, in which the Eighth Circuit Court of Appeals granted a rehearing, 233 F(2d) 902, and in which this Court denied Certiorari, 1 L. ed(2d) 162. In the Dunning case the Trial Court had found that the activities in question were not an integral part of the employees' principal duties. *Ciemnoczolowski* v. *Q. C. Ordnance Corp.*, 228 F(2d) 929, 934. In the instant case the activities in question have been found as a fact to be necessary to the performance of the principal activity and an integral part of it. The result reached by the Eighth Circuit in the *Dunning* case has no bearing on the question here presented and this Court in denying Certiorari in the *Dunning* case has not at all passed on the question presented by this Petition.

This Court has held that the activities in question are compensable under Section 4 of the Portal-to-Portal Act. There is no substantial difference between the provisions of Section 2 and Section 4, and there is no justification for giving a different treatment to these activities under Section 2 than they receive under Section 4. The facts in the *Dunning* case are completely different from the facts in this case and the decisions reached by the Eighth Circuit

and by this Court in the *Dunnina* case are not in point for the instant situation.

Furthermore, it has been found as a fact that the activities in this case constitute work under the *Skidmore* v. *Swift & Co.* case and they are compensable as work. They are so necessary to and so closely related to the principal activity as to be an integral part of it and compensable as such.

The decision of the Eighth Circuit in the instant case conflicts with the decision of this Court in both *Skidmore* v. *Swift & Co.*, *supra*, and in *Steiner* v. *Mitchell*, *supra*, and the decision by the Eighth Circuit is an erroneous construction of the Portal-to-Portal Act and necessarily raises an important question of federal law which has not heretofore been, but should be, settled by this Court.

Petitioners respectfully submit that the Eighth Circuit Court committed error. That error probably arises in the Court's failure to recognize the different factual situations here involved. Apparently the Court seemed to lump all the activities together and make one disposition of them when it said:

> "The exact nature of the activities of the various claimants has no important bearing upon the result we reach." (Appendix B, infra, p. 31.)

Surely the men are entitled for the overtime spent by them in their principal duties. Surely the men are entitled to compensation for the time they were held by the employer for the employer's purposes in a labor pool. They were held in the open three hundred and sixty-five days a year. There was no shelter provided for them where they were held. They were exposed to the summer heat and winter wind, the rain, the cold, the snow. They were certainly not there for their own comfort or conveni-

ence R.230, R.135. Surely the men are entitled, under the Portal-to-Portal Act to compensation for all the time they spent in tasks, duties and activities that the employer required of them and which the employer had itself made compensable. And, surely, the men are entitled to compensation for the time spent in activities demanded of them by the employer; necessary for the production in which they were engaged; so vital to the performance of their principal activities as to be an integral part of those principal activities; and activities which in an unquestioned finding of fact have been found to be work under the decisions of this Court. What is work, is of course a question of fact, but that question of fact has been resolved in favor of these claimants and they are entitled to be paid for the time consumed in the activities.

The Eighth Circuit refused to grant these men recovery. Petitioners respectfully submit that the Eighth Circuit erred.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

TALLEY & OWEN

COOPER JACOWAY

Counsel for Petitioners

APPENDIX A

MAXIMUM HOURS

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a work-week longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 7 (a) of the Fair Labor Standards Act of 1938; 29 U.S.C.A., Section 207 (a).

PENALTIES; CIVIL AND CRIMINAL LIABILITY; WAIVER OF CLAIMS; ACTIONS BY SECRETARY OF LAROR; LIMITATIONS OF ACTIONS

(b) Any employer who violates the provisions of Section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Section 16 (b) of the Fair Labor Standards Act of 1938; 29 U.S.C.A., Section 216 (b).

RELIEF FROM CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT AND THE BACON-DAVIS ACT

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947) on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—

(1) An express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) A custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Acts of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which

an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceedings seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this Section. May 14, 1947, c. 52 § 2, 61 Stat. 85.

Section 2 of the Portal to Portal Act of 1947; 29 U.S.C.A., Section 252.

RELIEF FROM CERTAIN FUTURE CLAIMS UNDER THE FAIR LABOR STANDARD ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT

(a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime-compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to

walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section. May 14, 1947, c. 52, § 4, 61 Stat. 86.

Section 4 of the Portal to Portal Act of 1947; 29 U.S.C.A., Section 254.

"Sponsors of the legislation in both Houses of Congress asserted that it 'in no way repeals the minimum wage requirements and the overtime compensation requirements of the Fair Labor Standards Act,' that it 'protects the legitimate claims' under that act, and that one of the objectives of the sponsors was to 'preserve to the worker the rights he has gained under the Fair Labor Standards Act.' It would therefore appear that the Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor Standards Act are to be given a liberal interpretation and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come 'plainly and unmistakably within (the) terms and spirit' of such an exemption."

Interpretative Bulletin

General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938 Section 790.2—Interrelationship of the Two Acts.

APPENDIX B

United States Court of Appeals
FOR THE EIGHTH CIRCUIT.

No. 15,535

Cities Service Defense Corporation, Appellant, v. George Dutton, et al., Appellees.	Appeal from the United States District Court for the Eastern District of Arkansas.

No. 15,536

George Dutton, et al., Appellants, v. Cities Service Defense Corporation, Appellee.	Appeal from the United States District Court for the Eastern District of Arkansas.

[January 11, 1957.]

Cooper Jacoway (Talley & Owen were with him on the brief), for George Dutton, et al.

Frank E. Chowning (Henry C. Walker, Jr.; Moore, Burrow, Chowning & Mitchell; and L. B. Burrow were with him on the brief), for Cities Service Defense Corporation.

Before WOODROUGH, VOGEL and VAN OOSTERHOUT, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

Defendant-employer appeals from judgment awarding certain employees compensation for unpaid overtime wages. Other employees have filed cross-appeal from judgment denying their claims for additional compensasation. All alleged services here involved were performed before the enactment of the Portal-to-Portal Act on May 14, 1947. Accordingly, the rights of the parties are governed by section 2 of the Portal-to-Portal Act, 29 U.S.C., section 252.

The principal issue involved in these appeals is whether section 2 of the Portal-to-Portal Act bars claims for any (all) activities except those compensable by either contract, custom, or practice. An affirmative holding upon this issue would require the denial of all of the employees' claims unless it is shown that the activities were compensable by contract, custom, or practice.

The defendant-employer operated a chemical plant at Maumelle, Arkansas, producing explosives during World War II. Various employees brought suit in federal court for overtime wages which they claimed to be due them under the Fair Labor Standards Act. These suits were consolidated for trial and are consolidated here. The plaintiff-employees will be generally referred to as employees.

These cases were before this court in *Dutton et al. v. Cities Service Defense Corporation*, 197 F.2d 458. The employees make some contention that our decision upon the former appeal is an adjudication that they are entitled to relief. Such is not the case. We there vacated the district court's order dismissing the action for fail-

ure to state claims upon which relief could be granted and of which the court had jurisdiction under section 2(d) of the Portal-to-Portal Act. This court, after finding that the pleadings raised the fact issue of whether or not the employees' activities were compensable by custom, stated (p. 460):

> "* * * But upon this appeal from the order of dismissal, this Court is precluded from considering more than is alleged in the complaint, and may not speculate as to whether the evidence at a trial would negative jurisdiction because of the Portal-to-Portal Act."

Upon remand this case was referred to a master who heard testimony and filed findings of fact and conclusions of law. The master found that the time consumed in performing the activities for which recovery was allowed constituted working time, and that recovery was not barred by the Portal-to-Portal Act. All parties filed objections to the master's findings and conclusions. The district court entered an order adopting the master's report, modifying it only to the extent of awarding liquidated damages. Judgment was entered for the employees in the amounts fixed by the master, plus 50 per cent liquidated damages.

We will outline briefly the nature of the employees' activities here involved. The largest group of employees was the ammonium picrate operators group. The master found that for health and safety reasons it was necessary for them to change clothes and bathe, and that by custom they were allowed and paid 30 minutes overtime daily for that purpose. Such finding is not disputed. The master also found that these employees were entitled to compensation for an additional 17 minutes daily for clocking in and clocking out, waiting, and traveling between the

gate and the production unit.[1] The situation with reference to the acid plant operators was substantially the same except their travel within the plant consumed less time, and these employees were each allowed 12 minutes additional overtime daily.

The claimants in the two categories above are the beneficiaries of about 83 per cent of the total judgment. However, claims of numerous other types of employees were allowed. Guards were allowed 7½ minutes per day for travel time between their reporting post and the post to which they were assigned. Other employees were found entitled to extra overtime by reason of travel time within the plant, or because they commenced their duties before the regular work period began by distributing tools or clothing to other employees or by the performance of other labor.

Rejected claims involved on the cross-appeal are claims of loading dock men for time consumed in getting their

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[1] The master found that these employees were entitled to compensation for the following items:

	Minutes	Total
Clocking in at Gate No. 9	3	
Loading on Bus at Gate No. 9	3	
Transportation from Gate 9 to Change House	5	
Changing Clothes at Change House	5	
Walking from Change House to Units	5	
Total going on shift		21
Walking from Units to Change House	5	
Taking Shower at Change House	5	
Changing Clothes at Change House	5	
Loading on Bus at Change House	3	
Transportation from Change House to Gate No. 9	5	
Clocking out at Gate No. 9	3	
Total going off shift		26
Total allowed per shift		47

The employees were paid for 30 minutes time for clothes changing and bathing which was deducted from the foregoing 47 minutes, leaving the balance of 17 minutes additional overtime.

trucks to the working area in the morning and away therefrom at night, claims of maintenance men and carpenters for time required to change clothes, assemble tools, and ride to their working location, and claims of machinists for changing clothes.

We have set out only some of the principal features of the numerous categories of claims here involved, since the exact nature of the activities of the various claimants has no important bearing upon the result we reach.

We are of the opinion that section 2 of the Portal-to-Portal Act bars all claims for overtime compensation for any and all activities performed prior to the date of the enactment of said Act, except such activities as were compensable under express provisions of a contract or by custom or practice. This is true as to section 2 claims even if the activities involved be considered an integral part of the employees' principal activities. Section 2 of the Portal-to-Portal Act provides in part:

> "(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—
>
> "(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> "(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such

> activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer."

This court recently had occasion to consider the applicability of section 2 of the Portal-to-Portal Act in the consolidated cases of *Ciemnoczolowski et al.* v. *The Q. O. Ordnance Corporation*, and *Dunning et al.* v. *The Q. O. Ordnance Corporation*, 228 F.2d 929. After the decision of the Supreme Court in *Steiner* v. *Mitchell*, 350 U.S. 247, and *Mitchell* v. *King Packing Co.*, 350 U.S. 260, a rehearing was granted in the *Dunning* case. After hearing argument upon rehearing, the prior decision denying relief to the employees was reaffirmed. *Dunning et al.* v. *The Q. O. Ordnance Corporation*, 233 F.2d 902. In the *Dunning* case, all activities for which relief was sought antedated the passage of the Portal-to-Portal Act. The employees were powder line workers. We found that said workers were compelled to change clothes and bathe for reasons of health and safety. They had not been compensated for clothes changing and bathing time. No contract or custom for paying for such services was established. In denying the claim this court states (p. 905):

> "It seems to us that Section 2 of the Portal-to-Portal Act was intended to preclude the allowance of claims such as those in suit, based, as they are, upon clothes-changing and showering activities which took place prior to May 14, 1947, and which were not compensable under any contract, custom or practice."

The *Steiner* and *King Packing Company* cases involve section 4[2] of the Portal-to-Portal Act which deals with

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[2] "Relief" from certain future claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act.

"(a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor

activities arising subsequent to the passage of the Act. It is apparent that the facts as to mandatory clothes changing in the *Steiner* and *Dunning* cases and our present cases are very similar. In each instance changing clothes and bathing were necessary for the employees' safety and health. If our present cases were governed by section 4, the *Steiner* case would compel us to hold that the clothes changing and bathing were part of the employees' principal activities and compensable as such. However, examination of section 2 and section 4 shows them to be vastly different. Section 2 bars compensation for "any activity" whereas section 4 bars compensation on account of the "following activities." What is meant by "following activities" is explained in subsections (a) (1) and (2) of section 4, set out in footnote 2. In general, the activities for which compensation is denied under section 4 are travel time to and from the place of prin-

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Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

"(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

"(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

"(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

* * * * * * *"

cipal activity, and activities classified as preliminary and postliminary. In *Steiner* the Supreme Court states (pp. 255-256):

> "* * * Had Congress intended the result urged by petitioner, the very different provisions of Sections 2 and 4 would have been unnecessary; Section 2 could have been given prospective as well as retroactive effect."

In *Steiner* no section 2 claims are involved. The Supreme Court did, however, find it desirable to compare the differences between section 2 and section 4 as an aid to determine legislative intent. With reference to section 2 the Court states (pp. 253, 255):

> "The Portal-to-Portal Act was designed primarily to meet an 'existing emergency' resulting from claims which, if allowed in accordance with *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, would have created 'wholly unexpected liabilities, immense in amount and retroactive in operation.' This purpose was fulfilled by the enactment of Section 2. * * *"
>
> "On the whole it is clear, we think, that while Congress intended to outlaw claims prior to 1947 for wages based on all employee activities unless provided for by contract or custom of the industry, including, of course, activities performed before or after regular hours of work, it did not intend to deprive employees of the benefits of the Fair Labor Standards Act where they are an integral part of and indispensable to their principal activities. * * *"

From the *Steiner* opinion as a whole it would appear that the last part of the statement quoted, to the effect that Congress did not intend to deprive employees of the benefits of the Fair Labor Standards Act "where they are an integral part of and indispensable to their principal activities", is a statement of the law intended to apply to

claims arising under section 4, and not to claims arising under section 2.

This court relied largely upon the above-quoted language from the *Steiner* opinion, as well as said opinion as a whole, in reaching its conclusion in the *Dunning* case. Certiorari was denied in the *Dunning* case on December 3, 1956. We realize that the denial of certiorari does not necessarily mean that the Supreme Court has considered and approved our decision in *Dunning*. Nevertheless, the *Dunning* case stands as the last expression of this court on the interpretation to be given to section 2. We adhere to the conclusions reached in *Dunning*, and hold that section 2 of the Portal-to-Portal Act governing claims arising before May 14, 1947, bars overtime compensation for all activities for which compensation is not provided by contract, custom, or practice.

There remains for consideration the question of whether any of claimants have established that any of the activities upon which they base their present claims are compensable by contract, custom, or practice. There is no proof of any kind that the activities are compensable by contract. Upon the issue of custom or practice, the master's finding, approved by the trial court, is:

> "There was no custom or practice on the part of the defendant at any time to pay any of the plaintiffs or intervenors or any employees of the defendant overtime compensation for the various activities for which the respective plaintiffs seek a recovery herein, other than the restricted custom and practice, under specific authority and approval from the Ordnance Department based upon custom in other like plants, of paying thirty (30) minutes daily overtime to the acid plant operators, ammonium picrate operators and acid plant and ammonium picrate maintenance

> men in the production area, who in their shift work were in close contact with acids and chemicals, which were to compensate them for the time consumed by them daily in the specific activities of changing clothes and bathing, and none other, and the further restricted custom and practice, under specific authority and approval from the Ordnance Department, of paying the guards twenty (20) minutes daily overtime to compensate them for the time consumed in the specified activity of changing clothes and answering roll call. * * *"

The employee-claimants urge that the admitted practice of paying certain workers, who were mandatorily required to change clothes for reason of safety and health, for 30 minutes overtime daily for such bathing and clothes changing established a custom or practice to pay for all of the claimed activities for which compensation is here sought, such as punching the clock, waiting for and riding on the bus to and from the work area, and the like. The master rejected this contention and properly so.

The practice to pay for one type of activity does not establish a practice to pay for vastly different types of activity. The record here and the master's findings show that the practice of compensating for mandatory clothes changing and answering roll call was adopted only after specific authority from and approval by the Ordnance Department. No such authority or approval is shown for payment for other activities. Further, no satisfactory evidence is before us that would establish any custom or practice either in the industry generally or on the part of the defendant to pay for the activities for which claim is here being made. In *Bumpus et al.* v. *Remington Arms Co., Inc.*, D.C. Mo., 74 F.Supp. 788, the trial court sustained a motion to dismiss a petition for overtime com-

pensation. This court affirmed, 183 F.2d 507, stating, among other things, that the employee has the burden of clearly stating and proving himself to be within an exception to section 2 of the Portal-to-Portal Act in order to sustain the jurisdiction of the court. In our present cases the claimants have failed to establish that their claims fall within any of the exceptions of section 2. No contract, custom, or practice to pay for the services claimed has been established. The master and the trial court so found. We agree.

It would appear that many of the activities involved in these claims, other than those for clothes changing and bathing for reasons of health and safety for which payment has been made, would fall in the categories of travel time and preliminary and postliminary activities. As we have heretofore held that all activities involved in these cases are barred by section 2 of the Portal-to-Portal Act, no purpose will be served in determining whether the evidence supports the finding that the time spent in the activities upon which these claims are based constitutes working time. We emphasize again that these cases are controlled by section 2, the section under consideration in the *Dunning* case, supra, not by section 4 which was involved in *Steiner* v. *Mitchell*, supra.

Since no contract or custom has been established for payment of overtime compensation to the employees for the activities upon which they base their claims, the court was without jurisdiction to grant relief. Section 2(d) of the Portal-to-Portal Act, 29 U.S.C., section 252(d), provides that courts shall be without jurisdiction to enforce liability for activities not compensable by contract, custom, or practice under section 2(a) and (b) of the Portal-to-Portal Act.

The conclusion we have reached makes it unnecessary to consider any of the other issues raised.

Judgment reversed on defendant's appeal and affirmed on the employees' cross-appeal. Cases remanded to the trial court with directions to dismiss all petitions.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.